1927.

Present: Garvin J.

In the Matter of the Trial of THOMAS PERERA *alias* BANDA.

29—P. C. Colombo, 43,833.

Autrefois acquit—*Jury asked to reconsider verdict—Discharge by Commissioner of Assize—Delivery of verdict—Criminal Procedure Code, ss. 230, 248 (2).*

Where a jury was directed by a Commissioner of Assize to reconsider their verdict, and where before such reconsidered verdict was delivered the Court discharged the jury,—

Held, that the Court had power to discharge the jury under section 230 of the Criminal Procedure Code.

Such an order of discharge cannot be pleaded as *autrefois acquit* in a retrial on the same indictment.

THE accused was indicted before the Supreme Court with murder and with having caused evidence of the commission of that offence to disappear, and in answer to the indictment submitted a plea of *autrefois acquit*.

It appeared that the accused had stood his trial before the Commissioner of Assize at Colombo on the same indictment, when the jury returned a verdict of acquittal by a majority of five to two, on both counts.

The Commissioner of Assize then asked the jury to retire and to consider whether the prisoner was not guilty of culpable homicide not amounting to murder. The jury then retired, and on their return the Commissioner of Assize discharged them—before a verdict was given. It was contended that as the jury were prevented from giving a verdict after reconsideration, the original verdict must be deemed to be the true verdict.

March 15, 1927. GARVIN J.—

In answer to the indictment presented in this case the prisoner pleaded that he had been tried and acquitted on this indictment and could not in law be tried again. At the termination of the argument which took place before me on March 14, I ruled that the plea failed, and intimated that in view of the somewhat exceptional circumstances under which the plea was raised my reasons would be set down in writing.

The facts material to the determination of this matter appear in the evidence of Mr. Gunaratne, who officiated as registrar at the first trial. It is sufficient here to say that the trial followed the usual course up to the point when the jury who retired to consider

their verdict returned, and, in answer to the usual questions, intimated that by a majority of five to two they found the prisoner not guilty on both counts of the indictment.

The learned Commissioner of Assize inquired whether the jury did not think the prisoner guilty of the lesser offence of culpable homicide not amounting to murder. The foreman replied that they had not considered that aspect of the case. The Commissioner then asked the jury to retire and consider whether the prisoner was not guilty of culpable homicide not amounting to murder.

It is of course competent for a jury upon an indictment for murder to find the prisoner guilty of culpable homicide not amounting to murder or any lesser offence if a view of the facts is possible which admits of such a verdict.

In directing the jury to retire and consider the matter further the Commissioner presumably was acting under the provisions of section 248 (2) of the Criminal Procedure Code. It is evident that the Commissioner did not approve of a verdict of not guilty to the indictment.

The provision of the law above refered to empowers the presiding Judge if he does not approve of a verdict to request the jury to reconsider their verdict. It was suggested that this power was only exercisable when the indictment contains a multiplicity of charges. This, it is said, is a conclusion which proceeds from a consideration of sub-section (1), which, it was contended, controls the meaning of sub-section (2) of section 248.

The two sub-sections refer to separate and distinct matters which are wholly unconnected, save in the one respect that they both relate to the verdict. The former, while stating that the verdict of the jury shall ordinarily be taken on all counts in the indictment, reserves to the Judge the power to direct that the verdict on certain counts need not be taken and to address to the jury such questions as he thinks necessary to ascertain what their verdict is; the latter vests him with power to direct the jury to reconsider a verdict of which he does not approve, subject to the reservation that the verdict returned after such reconsideration shall be deemed to be the true verdict.

Up to this point no verdict had been given upon which any argument in support of the plea of *autrefois acquit* can be founded.

In accordance with the directions of the Commissioner the jury retired, and when they returned he discharged them. No verdict was given or entered. In making his order discharging the jury the Commissioner intimated that he did so in exercise of the powers vested in him by section 230.

It is urged that the learned Commissioner was mistaken in his assumption that in the circumstances of this case he was empowered by section 230 to discharge the jury. Upon this contention was

1927.

GARVIN J.

In the Matter of the Trial of Thomas Perera alias Banda

based the further argument, that since the jury were prevented from giving a verdict after reconsideration the original verdict must be deemed to be the true verdict.

Now, a jury directed by the presiding Judge under section 248 (2) to reconsider a verdict of which he did not approve may resolve to return the same verdict or a different verdict. In this case it is conceivable that the jury may have resolved to return a verdict of guilty of culpable homicide not amounting to murder; they may have resolved to return a verdict of guilty on the indictment; it was open to them to find him guilty on the first count and not on the second, or *vice versâ;* they may have found the prisoner not guilty on both counts; in short, it was competent for them unembarrassed by any conclusion indicated in their first verdict to return any verdict they chose on the indictment.

It is idle to speculate as to the verdict they might have returned. To whatever cause the failure to return a verdict may be ascribed, no verdict was in fact returned. The verdict which the Commissioner being lawfully empowered thereunto requested the jury to reconsider is not the final verdict of the jury, and there is no other verdict. The absence of a verdict is fatal to any argument in support of the plea of *autrefois acquit* which is based on the existence of a verdict of not guilty.

But this contention, such as it is, has for its foundation the argument that the Commissioner was wrong in law in discharging the jury.

Section 230 of the Criminal Procedure Code is as follows:—

> " The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the Judge the interests of justice so require. "

In my view the argument that the Judge is only empowered to discharge the jury when the accused becomes incapable of remaining at the bar and in cases *ejusdem generis* with the case specified is untenable.

The rule of *ejusdem generis* is a rule of construction which is usually applicable when a series of particular and specific words indicative of a class is followed by general words. In such a case the general words are ordinarily construed subject to the limitation imported by the class to which the specified instances belong.

This is not such a case. The rule of interpretation applicable to this case is the general rule that the words of a statute ought *primâ facie* to be constructed in its primary and natural sense. There is nothing in the language of the section to suggest any intention that the power of discharge vested in a Judge was to be subject to any limitation other than that specified—the interests of justice.

The word " whenever " indicates the intention of the Legislature that the power was exercisable, not only in the case specified, but in any case in which, in the opinion of the presiding Judge, such a course was necessary in the interests of justice.

Moreover, the reservation of such a power is in accordance with the rule of English procedure, that it is competent for the Judge to discharge the jury when there is a necessity to do so. It is entirely in the discretion of the Judge whether he will excise the power or not, and his exercise of the discretion is not open to review—*vide R. v. Richard Lewis.*[1]

The Commissioner has not given his reasons for discharging the jury. Since it is not open to review his decision, there is nothing to be gained in ascertaining his reasons even if that were possible. A variety of grounds upon which juries have been discharged have in the English Courts been held to be good and sufficient reasons for the order of discharge—for example, when one of the jurors is taken so ill as not to be able to proceed with the trial; where misconduct on the part of one or more jurors is discovered before verdict; and in Ceylon the discovery in the course of the trial that a member of the jury empanelled to try the prisoner was disqualified from serving on a jury was followed by the discharge of the jury.

It is urged that the powers conferred by section 230 when used in conjunction with and after the exercise of the power vested in a Judge by section 248 (2) to direct a jury to reconsider a verdict of which he does not approve will enable a Judge to make it impossible for a jury to return a verdict with which he does not agree. The power conferred by section 230 is a large one, and the bare possibility of its misuse must be admitted. But in the interests of justice, which are identical with the interests of the community, large and unfettered powess to do justice are confidently committed to superior Courts, and in particular the supreme tribunal of the land. The mere possibility of misuse is not a reason for placing upon section 230 a meaning which the language of the enactment does not bear, and which sets to the powers conferred restrictions and limitations that will cripple those to whom it is entrusted in their efforts to secure that justice shall be done.

Inasmuch as the Commissioner's order is not open to review, and since his reasons are not before me, I have neither the power, nor am I in a position, to say anything judicially in regard to the order made in this case. But I am free with reference to the argument addressed to me to express my own opinion that to exercise in combination the powers committed by section 248 (2) and section 230 solely for the purpose of preventing a jury from returning a verdict which is not in accord with the presiding Judge's view of the case is not a use to which those powers should be put. So long as a

[1] *2 Criminal Appeal Reports 180.*

1927.

Garvin J.

In the Matter of the Trial of Thomas Perera alias Banda

jury remains an essential part of the tribunal constituted by law for the trial of persons indicted before the Supreme Court, the final verdict of the jury must prevail, and not the opinion of the presiding Judge; and the prisoner may not after trial be deprived of his right to the verdict of the jury on the question whether or no he is guilty of the charges or any of the charges laid against him, unless there are cogent reasons which demand that in the interests of justice the proceedings should be terminated before a final verdict is entered.

For the reasons set out earlier the plea of *autrefois acquit* fails. Such a plea must be founded upon proof of a former acquittal for the same offence. In this case there has been no such acquittal.